

USDOL/OALJ Reporter

[\*Justice v. Lockheed Martin Utility Services\*](#), 1999- ERA-26 (ALJ Nov. 30, 2000)

---

**U.S. Department of Labor**

Office of Administrative Law Judges  
525 Vine Street, Suite 900  
Cincinnati, OH 45202



(513) 684-3252  
(513) 684-6108 (FAX)

Date Issued: November 30, 2000

Case No: 1999-ERA-0026

In the Matter of

STEPHEN D. JUSTICE,  
Complainant,

v.

LOCKHEED MARTIN UTILITY SERVICES,  
Respondent,

APPEARANCES:

Steve Vidmer, Esquire  
Murray, Kentucky  
For the Complainant  
Mark Whitlow, Esquire  
Paducah, Kentucky  
For the Respondent  
Shahram Ghasemian, Esquire  
Paducah, Kentucky  
For the Employer

BEFORE: Joseph E. Kane  
Administrative Law Judge

### **RECOMMENDED DECISION AND ORDER**

This case arises under the Energy Reorganization Act of 1974, as amended, 42 U.S.C. § 5851, *et seq.* (hereinafter "the ERA"), and the regulations promulgated thereunder which are set forth in Part 24 of Title 29 of the Code of Federal Regulations. The ERA protects employees in the nuclear power industry from employment discrimination resulting from commencing, testifying at, or participating in proceedings or other actions to carry out the

purposes of the ERA or the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2011, *et seq.*

---

[Page 2]

The Complainant, Stephen Justice, filed a complaint under the ERA with the Occupational Safety and Health Administration (hereinafter "OSHA") on March 4, 1999. The Complainant alleged Dale Miles, an Electrical Maintenance Manager at the Paducah Gaseous Diffusion Plant, gave him an "unfair" annual performance review to punish him for filing an Assessment and Tracking Report he withdrew the prior year and for requiring the use of measuring and testing equipment on a cell trip test procedure. (Justice Complaint, at 1). Mr. Justice further alleged he committed to a Performance Improvement Plan and signed his Performance Review because he feared being terminated by the Respondent, Lockheed Martin Utility Services. *Id.*

After conducting an investigation, an OSHA Regional Supervisory Investigator found that insufficient evidence existed to support Mr. Justice's allegation that Mr. Miles gave the Complainant a deficient performance rating in retaliation for raising legitimate safety concerns regarding the proper use of measuring and testing equipment. The OSHA Investigator further found Mr. Justice's work performance warranted the deficient rating and the performance improvement plan. The Investigator concluded some of the evidence supported the Complainant's allegation that he was retaliated against because he filed an assessment and tracking report regarding overtime distribution; however, it was determined that the overtime assessment and tracking report was not a protected activity within the meaning of the ERA. On August 1, 1999, Mr. Justice appealed this determination and requested a hearing before the Office of Administrative Law Judges. A formal hearing was held before me in Paducah, Kentucky on January 25, 2000. The parties submitted evidence<sup>1</sup> and were given an opportunity to file post-hearing briefs.<sup>2</sup> A brief on behalf of the Complainant was received on April 6, 2000. A brief on behalf of the Respondent was received on April 5, 2000.

#### ISSUE

Has Mr. Justice proven by a preponderance of the evidence that Lockheed Martin Utility Services retaliated against him for engaging in conduct protected by the ERA?

#### FINDINGS OF FACT

\_\_Stephen Justice began working for Lockheed Martin Utility Services (hereinafter "LMUS" or "Respondent") in the Mechanical Maintenance Department of the Paducah Gaseous Diffusion Plant during June 1996. (JX 1). Mr. Justice started out as a Maintenance Supervisor while undergoing training to manage his own crew. *Id.* The Complainant's supervisor in the Mechanical Maintenance Department was Sam Johnson. (Tr. 26). During August 1996 Mr. Justice became a First Line Manager of the A-Shift in the Mechanical Maintenance Department. *Id.* During June 1997, Mr. Justice was

removed from the A-shift and became a Relief First Line Manager in Mechanical Maintenance. (Tr. 25). Mr. Johnson evaluated Mr. Justice's work performance for fiscal year 1997 (October 1, 1996 through September 30, 1997) and reviewed the evaluation with Mr. Justice on December 8, 1997. (RX 14). Mr. Johnson rated the Complainant's overall performance as an "effective performance minus<sup>3</sup>" and stated he considered the Complainant's performance to be "slightly less than effective." (Tr. 137). Sam Johnson also noted Mr. Justice needed to be "more assertive in dealing with subordinate personnel issues; more direct and straightforward in communicating standards of performance and expectations to subordinates; [and, needed to] ensure 'staff work' was complete and timely while not performing as a first line manager." (RX 14). Mr. Justice offered no comments on his performance evaluation, but expressed displeasure with his review in a December 9, 1997 memorandum to Sam Johnson. (RX 15). The rating of effective performance minus was the lowest rating Mr. Johnson gave during fiscal year 1997 and only Mr. Justice and possibly two other managers received such a rating. (Tr. 189).

Prior to completing the performance evaluation, Mr. Johnson had ranked the Complainant's performance according to an internal Distribution Matrix. (RX 4). Managers are ranked on the Distribution Matrix according to their individual potential and performance. *Id.* The ratings range from Group 1, the group with the greatest potential and best performance to Group 9, the group with the least potential and worst performance. *Id.* During March 1997 and July 1997, Mr. Johnson ranked Mr. Justice in Group 5, which contains individuals of "average" performance and potential. (RX 4, 13)(Tr. 182). However, during September 1997, Mr. Johnson ranked Mr. Justice in Group 8. (RX 13). Group 8 on the distribution matrix contains individuals who are "average" performers but have "no real prospect for increased contribution." (RX 4). Mr. Johnson testified that he gave Mr. Justice the lower ranking based on "some of the issues [Mr. Justice] had experienced on the job" and because he thought Mr. Justice's "potential for promotability and responsibility dropped," although the Complainant's performance stayed the same. (Tr. 183).

Sam Johnson testified that part of the reason for the Complainant's fiscal year 1997 performance rating involved problems Mr. Justice had experienced while managing the A-shift, a shift which has had the most conflict with management. (Tr. 140, 192). During his work as a First Line Manager of the A-shift, the Complainant wrote a letter to Al Sebi, the Complainant's immediate supervisor in Mechanical Maintenance. (RX 18). The letter contains no date but states that one of Mr. Justice's A-shift members was engaging in "insubordination." *Id.* In the letter, the Complainant stated that either the individual or himself had to be removed from the A-shift. *Id.* In the 1997 performance evaluation, Mr. Johnson acknowledged that "personnel issues arose which were not completely Mr. Justice's responsibility," but stated he was unable to resolve the issues without transferring the Complainant from the First Line Manager of the A-shift to a Relief First Line Manager position. (RX 15).

Mr. Justice worked as a First Line Relief Manager in Mechanical Maintenance until December 1997 when he was transferred to Electrical Maintenance. (Tr. 26). The Complainant was transferred to the Electrical Maintenance Department to provide administrative support to Dale Miles by helping with a backlog of work resulting from Assessment and Tracking Reports<sup>4</sup>. (Tr. 26).

*December 1997 Problem Report*

On December 16, 1997, Mr. Justice drafted a memorandum to his supervisor, Dale Miles and submitted a Problem Report. (RX 16). The subject of the memorandum was the type of test equipment used on a cell trip test procedure. *Id.* According to Mr. Justice, the purpose of a cell trip test is to insure that, in the event of an emergency shutdown, the compressor or cell will "trip" and stop driving uranium hexafluoride through atomic lines. (Tr. 27-28). Uranium hexafluoride is a radioactive material in gaseous form. (Tr. 29). In the event the cell fails to trip, the atomic line could break and release radioactive material. (Tr. 28). Mr. Justice drafted the December 16, 1997 memorandum because he was wanted to know whether general testing equipment or measuring and testing equipment should be used to perform the cell trip test procedure. (Tr. 31). The Complainant had noticed the procedure provided a space for the number of the measuring and testing equipment to be recorded.<sup>5</sup> *Id.* The Complainant testified he did not believe measuring and test equipment was being used to conduct the cell trip test procedure, but he also testified he never observed anyone using general test equipment to perform the procedure. (Tr. 31, 37). He stated he became aware of the issue through the problem reporting system and through talking with other managers. (Tr. 38). The Complainant also noted the Quality Assurance Plan required the use of measuring and test equipment in all activities affecting quality, such as the cell trip test procedure. (Tr. 39). Mr. Justice testified he spoke to the First Line Managers to determine what type of test equipment they would need to conduct the cell trip test procedure. (Tr. 32). He learned that only a Simpson 260 volt ohmmeter could be used to perform the test. *Id.* Because there were no calibrated Simpson 260 volt ohmmeters on site, the Complainant decided the best course of action was to purchase two of the calibrated meters. *Id.* Mr. Justice testified he ordered the meters after obtaining Dale Miles' permission to do so. (Tr. 33).

Mr. Justice also filed a December 16, 1997 problem report which generally requests clarification on when measuring and testing equipment should be used at the Paducah Gaseous Diffusion Plant. *Id.* The Complainant recommended the test equipment be labeled as measuring and testing equipment or general test equipment and that the applications of the uses of each type of equipment be defined. (RX 17). The December 16, 1997 problem report does not specifically address the use of measuring and testing equipment on any one procedure. Mr. Justice received a verbal response to the December 16, 1997 problem report from Jimmy Walker; however, he also requested a written response. (Tr. 39). The Complainant testified he

believes his request for a written response "bothered" Dale Miles because Mr. Miles appeared "more upset than usual." (Tr. 40). Mr. Justice also testified Mr. Miles was upset "most of the time." *Id.* Mr. Miles testified that he had instructed the Complainant to file the December 1997 problem report because the department needed "final clarification" on when measuring and test equipment should be used. (Tr. 196). The Complainant contends Dale Miles did not ask him to file the December 1997 problem report, but admits that Mr. Miles did not object to the filing of the problem report. (Tr. 84). The Complainant further testified that at the time he filed the December 1997 problem report, he "felt free" to file problem reports and was under the impression that such actions were "encouraged." *Id.* Randy Cothron, a Calibration Electronics Group Manager, testified that his department was assigned to respond to Mr. Justice's December 1997 problem report. (Tr. 229). Mr. Cothron stated he did not receive any negative comments from Mr. Miles regarding the problem report or his department's response to it. (Tr. 231). Mr. Cothron noted that Mr. Miles as well as all of the group managers at the plant have been "active" in the measuring and testing equipment issue. *Id.*

Shortly after the Complainant transferred to the Electrical Maintenance Department and was placed under the supervision of Dale Miles, he was given a work list prepared by Mr. Miles. (Tr. 202). According to Mr. Miles, the work list was supposed to give Mr. Justice a priority list of tasks he needed to be working on and to provide Mr. Justice with a time frame in which to complete those tasks. (Tr. 205). The Complainant understood the purpose of the work lists was to help him allocate his time and plan to meet completion dates. (Tr. 202). Mr. Miles testified that at the time he initiated the work lists, he did not have a problem with the Complainant's work performance and that he just wanted to give Mr. Justice a list of projects he needed to start. (Tr. 217). Dale Miles continued to provide Mr. Justice with work lists because he was dissatisfied with the rate at which the Complainant was moving procedures through the system. (Tr. 202). During mid-1998 Mr. Miles began receiving weekly status reports from Mr. Justice on his work progress. (Tr. 220). Mr. Miles testified that he required the Complainant to submit the status reports to motivate Mr. Justice to see that he needed to improve upon his work progress. (Tr. 211). The Complainant alleges he initiated the status reports to inform Mr. Miles of the activities he performed on a weekly basis, including activities outside of the Electrical Maintenance Department. (Tr. 48). Prior to the Complainant's arrival in Electrical Maintenance, Dale Miles had never supervised an individual whose sole job was to do procedures work. (Tr. 216). Mr. Justice is the only employee Mr. Miles provided with work lists and was the only employee who had to submit weekly status reports to Mr. Miles. (Tr. 48-49, 202-3).

On January 8, 1999, Dale Miles met with Mr. Justice to discuss Mr. Justice's performance review for fiscal year 1998 (October 1, 1997 through September 30, 1998). (RX 5, CX 2). Mr. Miles rated Mr. Justice's overall performance as deficient and stated Mr. Justice's performance met some but not all of the requirements of the position. He explained the Complainant "need[ed] to take control of an issue/situation (exhibit ownership), find an acceptable solution, and move forward without being prodded." *Id.* Mr. Miles noted Mr. Justice needed to improve the time in which he completed tasks and needed to meet objectives as needed. He also noted Mr. Justice "need[ed] more than normal direction and follow-up and need[ed] to work on communications." Mr. Justice felt "ambushed" by Mr. Miles' ratings of his work performance. (Tr. 45). He testified Mr. Miles never discussed any problems with him regarding his work performance. *Id.* Mr. Miles admitted he never had a formal discussion with the Complainant regarding performance problems. (Tr. 210).

The 1998 performance review provided a space for rating other performance factors such as job knowledge, quality, productivity, initiative, interpersonal skills, etc. Mr. Miles gave Mr. Justice a "below expectations" rating in this category and provided the following comments:

On one occasion, Steve was involved with work on a cell trip test. When he returned from the field he raised a question about M&TE requirements. The time to have raised the question was at the time he observed the job.

One of the planners spoke with Justice about the need for a breaker procedure. Steve's response was to tell the planner to file a problem report. I would have expected him to find the status of the procedure and give the planner an expected completion date.

This is a small item, but kind of demonstrates the issue stores had delivered material to the mezzanine (including some items that are quick to disappear).

Steve walked by and saw the material and realized it needed to be picked up. He came to tell me and Eva that the material was out near the hoist. Once we went to get the items he went along to help out.

(RX 5, CX 2).

Mr. Justice contends that Mr. Miles' comments about the cell trip test procedure refer to the Complainant's filing of the December 1997 problem report regarding measuring and testing equipment. (Tr. 104). Dale Miles stated the cell trip test comments in the 1998 performance review reference a later incident in which Mr. Justice happened to be in the field while Larry Davis was relieving a supervisor whose crew was performing a cell trip test procedure. (Tr. 207). According to Mr. Miles, the Complainant came into Mr. Miles' office and informed Mr. Miles that Larry Davis' crew either did not use or could not find measuring and test equipment to perform the cell trip test procedure. *Id.* Mr. Miles testified that he asked

Mr. Justice if he brought the issue up to the crew in the field and Mr. Justice said he did not. *Id.* Larry Davis testified that Mr. Miles called him and inquired about the test equipment Mr. Davis' crew used to perform the cell trip test procedure that day. (Tr. 147). Mr. Davis stated he informed Mr. Miles that he used general test equipment and that he was unaware any other type of meter was available on site. *Id.* Mr. Davis further testified that he had instructed a crew to perform the cell trip test procedure but he did not go and observe the test. (Tr. 148). According to Mr. Davis, Mr. Miles instructed him to file a problem report on the issue. (Tr. 147). Mr. Davis does not recall Dale Miles being upset about or hostile about the filing of the cell trip test problem report. (Tr. 154).

Larry Davis' problem report regarding the use of measuring and test equipment for the cell trip test indicates the problem was discovered on February 3, 1998. (RX 11). The problem report describes the problem as the performance of the cell trip test procedure without a calibrated ohmmeter. *Id.* Mr. Davis indicated in the problem report that there were no calibrated ohmmeters on site until one week prior and stated it had "been the practice to N/A the portion of the procedure which calls for calibration data." *Id.* Mr. Davis also stated that he was not aware that there were new calibrated meters available for use during the procedure. *Id.* Larry Davis testified that his purpose in filing the problem report was to determine whether the trip test procedure would be invalidated and would have to be performed with one of the new calibrated meters. (Tr. 153).

On February 3, 1998, Mr. Miles also drafted a memorandum to all Electrical, Relief and First Line Managers indicating the cell trip test procedure that had been in effect since January 15, 1998 required the use of measuring and test equipment. (RX 12). The memorandum indicates two Simpson 260 meters had been purchased to meet the requirements for the procedure and that the instruments were to be used in performing the procedure. *Id.*

Mr. Justice does not ever recall observing a cell trip test procedure being conducted without measuring and test equipment; however, in his post-hearing brief, counsel for the Complainant stated Mr. Justice "testified that when he observed the cell trip test being performed, he took immediate steps to rectify the problem." (Tr. 37)(Complainant's Post-Hearing Brief, p. 2). Counsel for the Complainant further stated "[i]t makes absolutely no sense to require that Mr. Miles would expect Mr. Justice to raise the question at the time he observed the job when there was no calibrated test equipment on site to correct the problem." Thus, Complainant's counsel acknowledges that Mr. Justice did in fact observe a cell trip test procedure being performed without measuring and test equipment, despite Mr. Justice's testimony to the contrary. The inconsistency between Mr. Justice's post-hearing brief and his hearing testimony casts doubt on the Complainant's credibility.

On September 14, 1998, Dale Miles ranked all of his First Line Managers in connection with a potential reduction in work force for fiscal year 1999. (RX 10). Mr. Miles ranked

Mr. Justice as the poorest performing first line manager in his department. *Id.* Mr. Justice received a total of thirty points on a seventy point scale. *Id.*

### *1998 Performance Improvement Plan & Commitment*

After receiving a deficient performance review for fiscal year 1998, Mr. Justice participated in a Performance Improvement Plan and Commitment (hereinafter "PIPC"). (RX 9). The PIPC provides for three reasons for the development of the plan, one of which is that the employee's performance has been rated as deficient. *Id.* The plan lists the problems with Mr. Justice's performance as identified by Dale Miles and contains a series of corrective actions to be taken in response to those problems. *Id.* In his complaint, Mr. Justice stated he submitted to the PIPC out of fear losing his job with the Respondent. Mr. Justice signed the PIPC on January 21, 1999. *Id.* Dale Miles held a series of status meetings with Mr. Justice. The status meetings occurred twice each month from February 5, 1999 through April 30, 1999. *Id.* In summarizing a March 9, 1999 status meeting with the Complainant, Mr. Miles noted the Complainant was "still hesitant to take on a task or action without being told to do so." *Id.* Mr. Justice responded that such a statement was an "unfair characterization of [his] initiative" and that he was "wrongly accused of [a] lack of initiative." (RX 9). In summarizing an April 30, 1999 status meeting, Mr. Miles noted Mr. Justice had demonstrated "more initiative in pushing procedures through the system," had improved his communication skills, and had an "increased level" of initiative. *Id.* Although Mr. Justice did not terminate his employment with LMUS until June 1999, the record contains no other documentation of status meetings after April 1999.

### *Employee Concerns Complaint*

Mr. Justice was "devastated" by his 1998 performance review and thought the review had a "career-ending effect." (Tr. 66). Mr. Justice filed a complaint with the Employee Concerns Division on January 27, 1999. (RX 20). In the complaint, Mr. Justice characterized his 1998 performance review as "unfair" and stated he believes Mr. Miles used the performance review as a method of retribution to punish the Complainant for "writing an ATR [he] withdrew last year." *Id.* The ATR to which the Complainant referred was an assessment and tracking report regarding overtime filed by Mr. Justice during August 1998. (Tr. 87). According to the Complainant, the purpose of the assessment and tracking report was to let everyone know he did not mind working overtime and would be happy to do so. (Tr. 88). The Complainant filed the report on either a Thursday or a Friday and withdrew it the following Monday because he was not happy with his description of the problem or with his method of approach. (Tr. 87)(RX 21). Anthony Canterbury, Dale Miles' supervisor, spoke with the Complainant regarding the overtime issues and gave Mr. Justice the opportunity to work overtime as long as it "did not interfere with the duties Mr. Justice was to perform for Mr. Miles. (Tr. 123). Mr. Justice testified he did not mean to refer to the overtime assessment and tracking report in the Employee Concerns complaint and denies talking with Mr. Canterbury regarding overtime issues. (Tr. 101).

A memorandum to Employee Concerns signed by the Complainant on February 9, 1999 indicates Mr. Justice wished to challenge his performance rating because he had no documentation of deficient performance throughout fiscal year 1998 and because he thought Dale Miles treated him differently than other Electrical Maintenance employees. (RX 19). The memorandum also states that Mr. Justice did not believe the issue involved a potential safety issue. *Id.* Anthony Canterbury received a February 17, 1999 memorandum from the Manager of Employee Concerns recommending that Mr. Justice's deficient performance rating be changed to an effective performance rating because there was insufficient documentation to support the deficient performance rating. (CX 5)(Tr. 117-18). Mr. Canterbury testified that he discussed Mr. Justice's performance review with Dale Miles and that it was determined the deficient performance rating should stand. (Tr. 118)(RX 19).

During February 1998, the Complainant requested a transfer back to the Mechanical Maintenance Department because of Mr. Miles' demeanor toward him. (Tr. 96). Mr. Justice testified that he did not speak to Mr. Canterbury regarding the transfer. (Tr. 97). Mr. Canterbury testified that the Complainant discussed with him overtime issues and the Complainant's difficulty in getting along with Mr. Miles. (Tr. 164). Mr. Canterbury stated Mr. Justice expressed an interest in returning to Electrical Maintenance but that Mr. Canterbury instructed him to work out his differences with Mr. Miles because Mr. Canterbury thought Mr. Justice's talents were needed more in Electrical Maintenance than in Mechanical Maintenance. *Id.* Mr. Canterbury also noted that the Complainant never said Mr. Miles' behavior toward him was in retaliation for filing a problem report or an assessment and tracking report. *Id.*

### *Disparate Treatment*

The Complainant testified that he cannot cite any instances in which Mr. Miles directly criticized him for filing the problem report, other than Mr. Miles' demeanor toward him and the fact that he alleges Mr. Miles treated him differently than other Electrical Maintenance managers. (Tr. 84). Mr. Justice testified that Mr. Miles did not treat him like the rest of the Electrical Maintenance Managers "for some unknown reason." (Tr. 85). Mr. Justice mentions three different instances in which he alleges he was treated differently than the other Electrical Maintenance Managers. First, Mr. Miles provided the Complainant with work lists and required the Complainant to submit weekly status reports on his work progress, but did not require other managers to do so. (Tr. 48-49, 202-3). Second, Mr. Justice testified that Mr. Miles became "extremely upset" when Sam Johnson asked if Mr. Justice could relieve a First Line Supervisor in Mechanical Maintenance for four days around Easter 1998. (Tr. 89). Mr. Justice testified that Mr. Miles was "out to punish [him] for some reason" and that he had to "assume" it was because of the cell trip test procedure and the measuring and testing equipment problem report. (Tr. 90). Mr. Miles

admitted that he became upset with Mr. Justice when he wanted to do some relief work in Mechanical Maintenance around Easter 1998; however, Mr. Miles testified he was upset because he wanted to make sure that Mr. Justice did not violate the limitation on the number of hours a supervisor can work each week. (Tr. 223). Mr. Canterbury, Dale Miles supervisor, gave the Complainant an opportunity to work overtime in Sam Johnson's department as long as the work did not interfere with the work the Complainant had to perform for Mr. Miles. (Tr. 123). The third incident in which Mr. Justice alleges he was the victim of disparate treatment by Mr. Miles involves the distribution of overtime hours among the First Line Managers in Electrical Maintenance. The Complainant alleges other managers in Mr. Miles' department were getting overtime while he was not. (Tr. 57-58).

#### *Voluntary Reduction in Work Force*

During June 1999, Mr. Justice terminated his employment with LMUS in connection with a voluntary reduction in work force (hereinafter "VRIF") at United States Enrichment Corporation. (RX 22). The Complainant testified that at the time of the 1998 Performance Review, he had not planned on leaving his job with LMUS. (Tr. 63). Mr. Justice stated he received a memorandum indicating that if not enough people volunteered for the VRIF, there would be an involuntary reduction in work force (hereinafter "RIF") and that an employee's performance would be a factor in deciding whose employment would be terminated. (Tr. 64). No one ever told the Complainant his job was in jeopardy; however, no one asked the Complainant to stay when he announced his participation in the VRIF. (Tr. 99, 179). Mr. Justice testified that no one instructed him to participate in the VRIF. (Tr. 108). Mr. Canterbury testified he does not believe that Mr. Justice's employment would have been terminated had he chosen not to participate in the VRIF because more people volunteered for the VRIF than was necessary. (Tr. 178). Nevertheless, a September 16, 1998 memorandum written by Anthony Canterbury indicates Mr. Justice was selected for a potential layoff in the event of an involuntary reduction in work force because Mr. Canterbury thought Mr. Justice's "performance was substantially lower than his peers." (RX 10). In selecting Mr. Justice for a potential RIF, Mr. Canterbury relied on Dale Miles' September 14, 1998 rankings of the First Line Managers rather than the fiscal year 1998 performance evaluations. *Id.*

#### *Subsequent Employment and Damages*

When Mr. Justice left his employment with LMUS, he had already accepted a position at the Portsmouth Gaseous Diffusion Plant. (Tr. 68). The Complainant moved to Portsmouth the weekend before the Fourth of July and began working the following Tuesday. (Tr. 68). Mr. Justice received no wages for approximately two weeks during this employment transition. (Tr. 69). Because the Complainant's wife and son continued to reside in Paducah, he purchased a used motor home for \$15,000 to travel to and from Paducah. (Tr. 69- 70). His employment at the Portsmouth Gaseous Diffusion Plant was pursuant to a short-term contract and ended during late August, 1998. (Tr. 71). Mr.

Justice then obtained employment at D.C. Cooke Nuclear Plant on Lake Michigan from September 20, 1999 to October 29, 1999. (Tr. 72). His employer at that time was Sun Technical. (Tr. 74). Mr. Justice was not employed from

---

[Page 11]

the first week of September to September 20, 1999 and lost an additional three weeks wages. (Tr. 73). Mr. Justice left his job at Sun Technical with his employer's permission because he obtained a job with Informatics in Paducah, Kentucky. (Tr. 74-75). Mr. Justice is currently employed by Informatics as an Authorized Derivative Classifier at the United States Enrichment Corporation Plant. (Tr. 23). He reviews documents under a sub-contract for litigation support and customer needs. (Tr. 24). The Complainant earns \$6,400 per month. (Tr. 75). The Complainant seeks recovery for damage to his reputation, lost wages, and requests that I order LMUS to either destroy the 1998 performance review or turn over all copies of the review to the Complainant.

### CONCLUSIONS OF LAW

In order to establish a prima facie case of discrimination under the ERA, Mr. Justice must set forth facts sufficient to infer that the Respondent discriminated against him in retaliation for engaging in conduct protected under the ERA. *See Bartlik v. U.S. Dep't of Labor*, 73 F. 3d 100, 103 n. 6 (6th Cir. 1996), citing *DeFord v. Secretary of Labor*, 700 F. 2d 281, 286 (6th Cir. 1983); *Adornetto v. Perry Nuclear Power Plant*, 1997-ERA-16, at 3 n. 5 (ARB Mar. 31, 1999). The Respondent can rebut the Complainant's prima facie case with evidence that establishes the adverse employment action was motivated by legitimate, nondiscriminatory business reasons. *See Kettl v. Gulf States Utils. Co.*, 92-ERA-33, (Sec'y May 31, 1995), citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993). If the Respondent rebuts the Complainant's prima facie showing, the Complainant must then establish that the employer's proffered reasons were a pretext for discrimination. *Id.*

However, in cases where the employer asserts a non-discriminatory reason for an adverse employment action, the elements of a prima facie case need not be analyzed. *See Carroll v. Bechtel Power Corp.*, 91 ERA-46 (Sec'y Feb. 15, 1995), *aff'd sub nom. Bechtel Corp. v. United States Dep't of Labor*, 78 F. 3d 352 (8th Cir. 1996); *Adjiri v. Emory University*, 97-ERA-36, at 6 (ARB July 14, 1998); *Eltzroth v. Amersham Medi-Physics, Inc.*, 1997-ERA-31, at 4 (ARB Apr. 15, 1999). When an employer produces evidence that the Complainant was subjected to an adverse action for a legitimate, non-discriminatory reason, it is not necessary for an Administrative Law Judge to address whether the Complainant presented a prima facie case. *See Kettl*, 92-ERA-33, at 6. The relevant inquiry becomes whether the Complainant can prevail on the ultimate question of liability. *Id.* Thus, in such a situation, the Administrative Law Judge can proceed directly to an inquiry of whether the Complainant has proven the Respondent's reason is pretextual. *Jackson v. Ketchikan Pulp Co.*, 93-WPC-7 (Sec'y Mar. 4, 1996).

Before considering the merits of Mr. Justice's claim, I note that my jurisdiction is limited to determining whether the Complainant was discriminated against by the Respondent because he engaged in an activity protected under the ERA. I cannot address whether LMUS acted properly in making decisions unrelated to the Complainant's protected activity nor do I have the authority to decide whether Mr. Justice's supervisors acted improperly unless their actions were related to a protected activity under the ERA. My inquiry must focus solely on whether Mr. Justice's protected activity was the reason for the alleged adverse action taken by LMUS.

*Protected Activity and Legitimate, Non-Discriminatory Business Reason*

The parties agree that Mr. Justice's filing of the December 16, 1997 problem report (hereinafter M&TE PR) regarding the proper use of measuring and test equipment is the only ERA protected activity in which the Complainant engaged. (Tr. 15-16). The Complainant alleges Dale Miles gave him a deficient performance rating and required him to submit to a Performance Improvement Plan and Commitment (hereinafter PIPC) because he filed the M&TE PR. Mr. Justice further alleges the 1998 performance evaluation and PIPC were designed to target him for a reduction in work force. LMUS contends Mr. Justice's 1998 performance review and PIPC were based exclusively on the Complainant's work performance and were not ways to retaliate against Mr. Justice for filing the M&TE PR. If true, this reason is a legitimate, nondiscriminatory reason for the deficient performance review and the PIPC. Thus, I must now determine whether the Complainant has established that LMUS's proffered reason for its adverse actions was merely a pretext for discrimination.

*Pretext*

Based on a careful review of the record, I find Mr. Justice has failed to establish by a preponderance of the evidence that his 1998 performance review and PIPC were the result of retaliatory motivation by LMUS. The Complainant testified that Dale Miles did not object to the filing of the M&TE PR. (Tr. 84). Mr. Miles also testified he was not upset by the M&TE PR nor was he aware of any other member of management who was displeased with the report. (Tr. 196-97). Dale Miles' testimony is corroborated by the testimony of his former supervisor, Anthony Canterbury, and by the testimony of Randy Cothron, the individual whose department responded to the M&TE PR. Mr. Canterbury was not aware of any member of management who resisted or showed animosity toward the filing of the M&TE PR. (Tr. 16). Randy Cothron also stated he never received any negative comments from Dale Miles regarding the M&TE PR or his department's response to the report. (Tr. 231). Although Dale Miles, Anthony Canterbury, and Randy Cothron testified as to the absence of a retaliatory motive, the presence of such a motive may be proven by circumstantial evidence, even though the witnesses testified they did not perceive a retaliatory motive. *See Ellis Fischel State Cancer Hosp. v. Marshall*, 629 F.2d 563, 566 (8th Cir. 1980), *cert. denied*, 450 U.S. 1040 (1981).

Mr. Justice filed the M&TE PR on December 16, 1997. (RX 16). On the annual performance review for fiscal year 1998, which covered the period beginning October 1, 1997 through September 30, 1998, Dale Miles rated Mr. Justice's overall work performance as deficient. Mr. Miles reviewed the Complainant's performance rating for fiscal year 1998 with the Complainant on January 8, 1999. (RX 5)(CX 2). The Administrative Review Board has held the temporal proximity between a protected activity and an adverse employment action is an important factor in determining whether an employer acted with retaliatory motive. *See White v. The Osage Tribal Council*, 95-SDW-1, at 4 (ARB Aug. 8, 1997). Dale Miles' rated Mr. Justice's performance as deficient during the next annual performance review following the filing of the M&TE PR. Nevertheless, I find the closeness in time between the December 1997 M&TE PR and the fiscal year 1998 performance review, when viewed in light of the absence of any other evidence of retaliatory motive, is insufficient to establish that LMUS acted with a discriminatory motive.

LMUS presented credible evidence that Dale Miles experienced some of the same problems with Mr. Justice's work performance that Mr. Justice's former supervisor, Sam Johnson, had experienced. Sam Johnson evaluated the Complainant before the filing of the M&TE PR and before the voluntary reduction in work force; whereas, Dale Miles evaluated Mr. Justice's performance after Mr. Justice filed the M&TE PR. Mr. Johnson evaluated Mr. Justice's performance for fiscal year 1997 and Mr. Miles evaluated Mr. Justice's performance for fiscal year 1998. *Id.* Although Mr. Johnson and Mr. Miles ranked Mr. Justice's performance in a different ratings category, both supervisors believed Mr. Justice was among the poorest performers in their respective departments. Mr. Miles ranked Mr. Justice as the poorest performer in Electrical Maintenance as early as September 14, 1998 when the Complainant received only thirty points on a seventy-point ratings scale. (RX 10). Dale Miles rated Mr. Justice's overall performance for fiscal year 1998 as deficient. (RX 5)(CX 2). Mr. Justice and possibly two other managers were the only managers who received "effective performance minus" ratings from Sam Johnson in 1997. (Tr. 189). Mr. Johnson testified that the "effective performance minus" rating was the lowest rating any of his managers received during fiscal year 1997. *Id.* Moreover, both supervisors indicated Mr. Justice needed to complete tasks in a more timely fashion and needed to work on his ability to communicate with subordinates. (RX 5, 14)(CX 2). Sam Johnson thought the Complainant needed to be more assertive in dealing with subordinate personnel issues; whereas, Dale Miles thought Mr. Justice needed to show more initiative in exhibiting ownership over problems and devising acceptable solutions. I find the similarities noted by Sam Johnson and Dale Miles regarding problems with the Complainant's work performance support LMUS's contention that it did not retaliate against Mr. Justice for filing the M&TE PR.

Furthermore, Dale Miles' overall rating of the Complainant's performance for fiscal year 1998 does not differ greatly from Sam Johnson's ranking of Mr. Justice's overall performance for fiscal year 1997. Sam Johnson ranked the Complainant's overall

performance as an "effective performance minus" in 1997. (RX 14). The performance ranking system did not provide for an "effective performance minus" category. *Id.* The category was created by Sam Johnson because he found Mr. Justice's performance to be "slightly less than effective." (Tr. 137). Dale Miles also found Mr. Justice's performance to be less than effective; however, Mr. Miles did not create an artificial category for

---

[Page 14]

the Complainant's performance. Mr. Miles simply rated Mr. Justice as a deficient performer, which was the next rating below effective performance. (RX 5, 24)(CX 2). Mr. Miles' unwillingness to create a special ratings category for Mr. Justice's work performance does not establish that Mr. Miles' acted with a retaliatory motive.

Anthony Canterbury testified that he received a February 17, 1999 memorandum from the Manager of Employee Concerns regarding Mr. Justice's 1998 performance evaluation. (Tr. 117). The memorandum indicates two human resource specialists and the Employee Concerns Manager determined there was insufficient documentation to support Dale Miles' deficient performance rating and recommended the rating be changed from deficient to effective performance. (CX 5). Mr. Canterbury testified that he reviewed the performance evaluation with Mr. Miles and concluded the deficient performance rating was justified. (Tr. 118-9). Although the memorandum may indicate Dale Miles failed to sufficiently document activities which would provide a basis for the deficient performance rating, the memorandum, when viewed in light of the absence of any other evidence of discriminatory motive, does not establish a causal nexus between the deficient performance review and the 1997 M&TE PR.

Moreover, the facts and circumstances regarding the performance improvement plan in which Mr. Justice participated do not indicate that Dale Miles acted in retaliation for the filing of the M&TE PR. The PIPC provides for three reasons for the development of a PIPC, one of which is that the employee's performance has been rated as deficient. (RX 9). Thus, Dale Miles was acting according to company policy by requiring a PIPC for someone who had received a deficient performance evaluation. The PIPC meetings between Mr. Justice and Dale Miles occurred twice monthly. During February and March 1999 status meetings Dale Miles continued to note problems with Mr. Justice's communication skills and what Mr. Miles perceived as the Complainant's lack of initiative. However, in the last status report of record dated April 30, 1999, Mr. Miles noted Mr. Justice's work performance had improved in several areas. *Id.* Dale Miles stated the Complainant "had a better flow of procedures through the system," had improved his communication skills, and had demonstrated an "increased level of initiative, and an improved sense of urgency." *Id.* Dale Miles' recognition of Mr. Justice's improved work performance also fails to support Mr. Justice's contention that the 1998 performance review and PIPC were acts of discrimination.

---

[Page 15]

Dale Miles specifically mentioned a cell trip test incident in the 1998 evaluation, but I do not find the reference indicative of a retaliatory motive. Dale Miles testified that his reference to the cell trip test in the performance review had nothing to do with the M&TE PR filed by Mr. Justice. (Tr. 208). Mr. Miles stated he was referring to a cell trip test Mr. Justice informed Mr. Miles that he had observed being performed without measuring and test equipment. (Tr. 207). Mr. Miles further testified that he instructed Larry Davis to file a problem report on the cell trip test incident after Mr. Justice failed to address the problem. *Id.* On the same day that Mr. Davis filed the cell trip test problem report, Dale Miles sent a memorandum out to the Electrical Maintenance managers stating the cell trip test procedure required the use of measuring and test equipment and that such equipment was available on site. (RX 12). Larry Davis testified Dale Miles phoned him and inquired about the test equipment his crew had used to perform a cell trip test procedure. (Tr. 147). Mr. Davis stated Dale Miles instructed him to file a problem report on the cell trip test procedure upon learning the test was performed without properly calibrated equipment. *Id.* All of these factors support Dale Miles' testimony that he was not upset about the M&TE PR or the use of measuring and test equipment on the cell trip test procedure.

Mr. Justice testified that he never observed a cell trip test being performed without measuring and test equipment. (Tr. 37-38). However, in his post-hearing brief, the Complainant states that he testified that he did in fact observe a cell trip test procedure being performed with improper test equipment and that the incident prompted the M&TE PR and the order of the Simpson 260 volt ohmmeters during December 1997. (Complainant's Post-Hearing Brief, at 2). Given the inconsistency between the Complainant's testimony and his post-hearing statements on this issue, I find the evidence fails to establish that the cell trip test reference in the 1998 performance evaluation relates to the M&TE PR. Nevertheless, even if I were to assume the cell trip test incident mentioned by Dale Miles refers to the M&TE PR, the reference does not support a finding of retaliatory motive.

Mr. Miles testified he mentioned the cell trip test incident as an illustration of the Complainant's inability to communicate with subordinates. (Tr. 207-8). Dale Miles' comments on the evaluation regarding the cell trip test incident support his testimony. (RX 5)(CX 2). The cell trip test reference in the performance review does not indicate that Mr. Miles was displeased with the fact that Mr. Justice raised the M&TE issue, but rather that Mr. Miles was displeased with Mr. Justice's failure to raise the issue at the time he observed the procedure. Furthermore, the category in which Dale Miles commented on the cell trip test procedure indicates he discussed the incident as an example of the Complainant's failure to communicate with subordinates. Mr. Miles mentioned the cell trip test incident in the ratings category for "other performance factors" which included such characteristics as Mr. Justice's interpersonal skills. *Id.*

I also note the facts and circumstances surrounding the submission of Mr. Justice's January 27, 1999 Employee Concerns Complaint cast doubt on Mr. Justice's allegation that he was the victim of retaliatory conduct. In his complaint to Employee Concerns, Mr. Justice stated he thought the 1998 performance rating was Dale Miles' way of punishing him for filing an assessment and tracking report (hereinafter "ATR") he withdrew in

1998. (RX 20). The only ATR the Complainant withdrew in 1998 involved the distribution of overtime among Electrical Maintenance Managers. (Tr. 87). Thus, Mr. Justice's January 27, 1999 Memorandum to Employee Concerns does not indicate he thought he was being punished for filing the M&TE PR. Moreover, in a memorandum to Employee Concerns signed by Mr.

---

[Page 16]

Justice on February 9, 1999, the Complainant indicated he wanted to challenge the deficient performance rating but stated the issue about which he complained did not involve a potential safety issue. (RX 19). Because the M&TE PR raised a legitimate safety concern, the February 9, 1999 memorandum does not establish that Mr. Justice thought his 1998 performance evaluation was related to the M&TE PR. Furthermore, Mr. Justice's own testimony was speculative as to the causal nexus between the M&TE PR and the deficient performance review. During the hearing, the Complainant testified that he believed Mr. Miles was "out to punish [him] for some reason" and that he "assume[d]" it was because of the cell trip test procedure and the M&TE PR. (Tr. 90).

The Complainant further stated he has no evidence that Mr. Miles intended to discriminate against him because of the problem report other than the fact that Mr. Miles allegedly treated him differently than the other managers. *Id.* Mr. Justice mentioned several ways in which he believes he was treated differently than other Electrical Maintenance Employees. First, the Complainant was the only manager Dale Miles provided with work lists and eventually required to submit weekly status reports on his work progress. (Tr. 48-49, 202-3). Although Mr. Miles had never utilized work lists with any other managers, he had never supervised a manager whose primary job was to do procedures work. (Tr. 215) Dale Miles testified that he initiated the work lists shortly after Mr. Justice was transferred to Electrical Maintenance and at a time when he did not have a problem with Mr. Justice's performance. Mr. Miles testified he continued to provide the Complainant with work lists because he was not happy with the rate at which the Complainant was pushing procedures through the system. (Tr. 202). Given the unique nature of Mr. Justice's job as primarily a procedures writer and given Mr. Justice's problems with timely completion of work assignments, I do not find the status reports and work lists evidence a retaliatory motive on behalf of Mr. Miles.

Second, Mr. Justice alleges Mr. Miles became extremely upset when Sam Johnson asked if Mr. Justice could relieve a manager in Mechanical Maintenance during Easter 1998. (Tr. 89-90). Mr. Miles admitted being upset about the relief work but stated it was only because he did not want the Complainant to violate the limitation on the number of hours a supervisor can work each week. (Tr. 223). Anthony Canterbury, Mr. Miles supervisor, gave Mr. Justice the opportunity to get overtime as a relief supervisor for Sam Johnson as long as the overtime did not interfere with the work Mr. Justice performed for Dale Miles. (Tr. 123). Mr. Justice relies only upon the fact that Dale Miles got upset about the relief work. However, Mr. Justice provided no evidence linking the change in Mr. Miles' mood to the M&TE filed during December 1997.

The Complainant also alleges the 1998 performance evaluation and PIPC was designed to target him for a reduction in work force. The Complainant testified that a memorandum was circulated throughout the plant which indicated an individual's performance would be the main criteria for determining who would be laid off during an involuntary reduction in work force (hereinafter "VRIF"). (Tr. 64). Mr. Justice participated in a voluntary reduction in work force by terminating his employment with LMUS during June 1999. (RX 22). Dale Miles stated the Complainant asked to attend an informational meeting on the voluntary reduction in work force, but states he never encouraged the Complainant to seek the VRIF. (Tr. 213-14). Anthony Canterbury testified that no one asked Mr. Justice to refrain from participating in the VRIF. (Tr. 179). The evidence establishes that Mr. Justice's position would have been one of three first line manager positions that would have been eliminated in the event of a fiscal year 1999 involuntary reduction in work force. (RX 10). Mr. Canterbury cited the Complainant's work performance as the reason for his selection for the reduction in work force. *Id.* Mr. Canterbury further testified that more than three managers chose to participate in the VRIF and thus Mr. Justice would not have been terminated in connection with an involuntary reduction in work force. (Tr. 178-79). Although the evidence tends to support Mr. Justice's belief that, in the event of an involuntary reduction in work force, his job would have been terminated, the evidence does not indicate that Mr. Justice's selection for the potential reduction in work force was based on anything other than his work performance. Moreover, the involuntary reduction in work force did not occur. The Complainant was a willing participant in the VRIF and the evidence clearly establishes that the Respondent neither encouraged nor coerced Mr. Justice into leaving his employment.

In conclusion, I find Mr. Justice's work performance was a legitimate, nondiscriminatory reason for his deficient 1998 performance evaluation and PIPC. For the above-stated reasons, I further find the evidence is insufficient to establish the Complainant's protected activity was a contributing factor in his 1998 performance evaluation and PIPC.

#### RECOMMENDED ORDER

It is hereby RECOMMENDED that the Secretary of Labor DISMISS the complaint of Stephen D. Justice.

JOSEPH E. KANE  
Administrative Law Judge

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S- 4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C.

20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision & Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§ 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).

#### **[ENDNOTES]**

<sup>1</sup>During the hearing, counsel for the Respondent objected to the admission of Complainant's Exhibit 5 into evidence. The exhibit is a February 17, 1999 memorandum from Steve Seltzer to Anthony Canterbury. Although Mr. Seltzer did not testify at the hearing, Mr. Canterbury testified he received the document and testified as to the contents of the memorandum. (Tr. 117-18). I find Mr. Canterbury's testimony sufficient to establish the authenticity of the memorandum. Therefore, Complainant's Exhibit 5 is now admitted into evidence.

<sup>2</sup>In this Recommended Decision and Order, references to ALJX, CX, RX, and JX pertain to exhibits offered by the Administrative Law Judge, the Complainant, the Respondent, and joint exhibits, respectively. The transcript of the hearing is cited herein as "Tr." and by page number.

<sup>3</sup>I note that there were five substantive performance rankings, listed in order as follows: outstanding performance, commendable performance, effective performance, deficient performance, and unacceptable performance. (RX 14). The Performance Review System also includes two ratings categories for employees whose performance could not be rated because the employee has either been on the job for less than six months or had been absent for a substantial part of the performance year. *Id.*

<sup>4</sup>According to the parties, a Problem Report is synonymous with an Assessment and Tracking Report. Both documents are employee generated notices of problems or issues the employee thinks should be addressed. (JX 1).

<sup>5</sup>Measuring and test equipment is calibrated equipment that meets national industry calibration standards. (Tr. 30). In contrast, general test equipment is not calibrated.